



DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[REG-121508-18]

RIN 1545-BO97

Multiple Employer Plans

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of proposed rulemaking and notice of public hearing; withdrawal of notice of proposed rulemaking.

SUMMARY: This document sets forth proposed regulations relating to certain multiple employer plans (MEPs) described in the Internal Revenue Code (the “Code”). The proposed regulations provide an exception, if certain requirements are met, to the application of the “unified plan rule” for MEPs in the event of a failure by one or more employers participating in the plan to take actions required of them to satisfy the applicable requirements of the Code. These proposed regulations would affect certain MEPs, participants in those MEPs (and their beneficiaries), employers participating in those MEPs, and plan administrators of those MEPs. This document also withdraws proposed regulations published in the **Federal Register** on July 3, 2019, amending the application of the unified plan rule to MEPs and provides a notice of a public hearing.

DATES: Written or electronic comments must be received by [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]. A public hearing on these proposed regulations has been scheduled for Wednesday, June 22, 2022, at 10 a.m. EST. Requests to speak and outlines of topics to be discussed at the public hearing must be received by [INSERT DATE

60 DAYS AFTER PUBLICATION IN THE *FEDERAL REGISTER*]. If no outlines are received by [INSERT DATE 60 DAYS AFTER PUBLICATION IN THE *FEDERAL REGISTER*], the public hearing will be cancelled. Requests to attend the public hearing must be received by 5 p.m. EST on Friday, June 17, 2022. The telephonic hearing will be made accessible to people with disabilities. Requests for special assistance during the telephonic hearing must be received by Thursday, June 16, 2022.

ADDRESSES: Commenters are strongly encouraged to submit public comments electronically. Submit electronic submissions via the Federal eRulemaking Portal at www.regulations.gov (indicate IRS and REG-121508-18) by following the online instructions for submitting comments. Once submitted to the Federal eRulemaking Portal, comments cannot be edited or withdrawn. The IRS expects to have limited personnel available to process public comments that are submitted on paper through mail. Until further notice, any comments submitted on paper will be considered to the extent practicable. The Department of the Treasury (Treasury Department) and the IRS will publish for public availability any comment submitted electronically, and to the extent practicable on paper, to its public docket. Send paper submissions to: CC:PA:LPD:PR (REG-121508-18), room 5203, Internal Revenue Service, PO Box 7604, Ben Franklin Station, Washington, DC 20044.

For those requesting to speak during the hearing, send an outline of topic submissions electronically via the Federal eRulemaking Portal at www.regulations.gov (indicate IRS and REG-121508-18).

Individuals who want to testify (by telephone) at the public hearing must send an email to publichearings@irs.gov to receive the telephone number and access code for the hearing. The subject line of the email must contain the

regulation number REG-121508-18 and the word TESTIFY. For example, the subject line may say: Request to TESTIFY at Hearing for REG-121508-18. The email should include a copy of the speaker's public comments and outline of topics. Individuals who want to attend the public hearing by telephone must also send an email to publichearings@irs.gov to receive the telephone number and access code for the hearing. The subject line of the email must contain the regulation number REG-121508-18 and the word ATTEND. For example, the subject line may say: Request to ATTEND Hearing for REG-121508-18. To request special assistance during the telephonic hearing contact the Publications and Regulations Branch of the Office of Associate Chief Counsel (Procedure and Administration) by sending an email to publichearings@irs.gov (preferred) or by telephone at (202) 317-5177 (not a toll-free number).

FOR FURTHER INFORMATION CONTACT: Concerning the regulations, Pamela Kinard at (202) 317-6000 or Tom Morgan at (202) 317-6700; concerning submission of comments or requests for a public hearing, Regina Johnson (202) 317-5177 (not toll-free numbers) or by sending an email to publichearings@irs.gov.

SUPPLEMENTARY INFORMATION:

Background

This document sets forth proposed amendments to the Income Tax Regulations (26 CFR part 1) under section 413(c) of the Code and proposed regulations under section 413(e) of the Code. This document also withdraws proposed regulations under section 413(c) that were published in the **Federal Register** on July 3, 2019 (84 FR 31777) (section 413(c) proposed regulations).

I. General Rules Relating to MEPs Including the Unified Plan Rule

Section 413(c) provides rules for a plan maintained by more than one employer.¹ A plan described in section 413(c) often is referred to as a multiple employer plan (MEP) or a section 413(c) plan.

Final regulations under section 413 were published in the **Federal Register** on November 9, 1979, 44 FR 65061 (the final section 413 regulations). The final section 413 regulations apply to MEPs described in section 413(c) and to collectively bargained plans described in section 413(b) (plans that are maintained pursuant to certain collective-bargaining agreements between employee representatives and one or more employers).

Pursuant to section 413(c) and the final section 413 regulations, all of the employers maintaining a MEP (participating employers) are treated as a single employer for purposes of certain Code requirements, which include the following requirements:

- under section 413(c)(1) and 26 CFR 1.413-2(b), the rules addressing plan participation under section 410(a) and the regulations thereunder are applied as if all employees of each of the employers that maintain the plan are employed by a single employer;
- under section 413(c)(2) and § 1.413-2(c), in determining whether a MEP is, with respect to each participating employer, a plan for the exclusive benefit of its employees (and their beneficiaries), all of the employees participating in the plan are treated as employees of each such employer; and

¹ Section 210 of the Employee Retirement Income Security Act of 1974, Pub. L. 93-406 (88 Stat. 829), as amended (ERISA), also provides rules relating to plans maintained by more than one employer. Similar to section 413(c) of the Code, section 210(a) of ERISA states that the minimum participation standards, minimum vesting standards, and benefit accrual requirements under sections 202, 203, and 204 of ERISA, respectively, shall be applied as if all employees of each of the employers were employed by a single employer. Under section 101 of Reorganization Plan No. 4 of 1978 (5 U.S.C. App.), the Secretary of the Treasury has interpretive jurisdiction over section 413 of the Code, as well as ERISA section 210.

- under section 413(c)(3) and §1.413-2(d), the minimum vesting standards under section 411 are applied as if all employers that maintain the plan constitute a single employer.

Other rules are applied separately to each participating employer. For example, under §1.413-2(a)(3)(ii), the minimum coverage requirements of section 410(b) generally are applied to a MEP on an employer-by-employer basis.

A plan is not described in section 413(c) unless it is maintained by more than one employer and is a single plan under section 414(l). See §§1.413-2(a)(2)(i) and 1.413-1(a)(2). Under §1.414(l)-1(b), a plan is a single plan if and only if, on an ongoing basis, all of the plan assets are available to pay benefits to employees who are covered by the plan and their beneficiaries.

Under §1.413-2(a)(3)(iv), the qualification of a MEP “is determined with respect to all employers maintaining the section 413(c) plan” (sometimes referred to as the unified plan rule). Therefore, the failure by one employer maintaining the plan (or by the plan itself) to satisfy an applicable qualification requirement will result in the disqualification of the section 413(c) plan for all employers maintaining the plan.

The section 413(c) proposed regulations, which are being withdrawn, would have created an exception to the unified plan rule for certain defined contribution MEPs. The exception generally would have been available, provided that certain conditions were satisfied, if a participating employer in a MEP was solely responsible for a qualification failure that the employer was unable or unwilling to correct, or if a participating employer failed to comply with a plan administrator’s request for information about a qualification failure that the plan administrator reasonably believed might exist.

Written comments responding to the section 413(c) proposed regulations were received, and a public hearing was held on December 11, 2019. The provisions of these proposed regulations were informed by the comments received with respect to the section 413(c) proposed regulations.

II. SECURE Act Provisions Related to MEPs

Section 101(a) of the Setting Every Community Up for Retirement Enhancement Act of 2019 (SECURE Act), which was enacted on December 20, 2019, as Division O of the Further Consolidated Appropriations Act of 2020, Public Law 116-94 (133 Stat. 2534), added section 413(e) to the Code. Section 413(e) creates a statutory exception to the unified plan rule for certain types of MEPs and directs the Secretary to issue guidance that is appropriate to carry out that provision. A MEP is eligible for the exception to the unified plan rule if it is a section 413(c) defined contribution plan² described in section 401(a) or consists of individual retirement accounts described in section 408 (including by reason of section 408(c)),³ provided that the MEP either is maintained by employers that have a “common interest” or has a “pooled plan provider.”⁴ Section 413(e)(1) provides that, with certain exceptions, this type of MEP will not be treated as failing to meet the applicable requirements under the Code merely because one or more employers of employees covered by the plan fail to take actions that are required for the plan to meet those requirements.

² Although section 403(b) plans are defined contribution plans, they are not plans described in section 401(a) or 408. Therefore, section 413(e)(1) does not apply to section 403(b) plans.

³ Prior to the SECURE Act, section 413(c)(2) of the Code provided, “For purposes of section 401(a), in determining whether the plan of an employer is for the exclusive benefit of his employees and their beneficiaries all plan participants shall be considered his employees.” Section 101(a)(2) of the SECURE Act amended section 413(c)(2) of the Code so that it applies for purposes of section 408(c) of the Code in addition to section 401(a) of the Code.

⁴ Section 101(c) of the SECURE Act also amended title I of ERISA to introduce the term “pooled plan provider,” as well as the term “pooled employer plan” for a plan with a pooled plan provider. See ERISA sections 3(44) and 3(43), respectively. These ERISA provisions do not address compliance under the Code for plans described in section 401(a) or 408, but the requirements for pooled plan providers and pooled employer plans are otherwise similar to the requirements in section 413(e).

Section 413(e)(2)(A) provides that section 413(e)(1) will not apply unless the terms of the plan provide that, in the case of any employer in the plan failing to take the actions described in section 413(e)(1), the assets of the plan attributable to employees of that employer (or beneficiaries of those employees) will be transferred to a plan maintained only by that employer (or its successor), to an eligible retirement plan as defined in section 402(c)(8)(B) for each individual whose account is transferred, or to any other arrangement that the Secretary determines is appropriate, unless the Secretary determines it is in the best interests of those employees (and their beneficiaries) to retain the assets in the plan. Section 413(e)(2)(A) also states that section 413(e)(1) will not apply unless the terms of the plan provide that, in the case of any employer failing to take the actions described in section 413(e)(1), the employer (and not the plan or any other employer in the plan) will be liable for any liabilities with respect to the plan attributable to employees of that employer (or their beneficiaries), except to the extent provided by the Secretary.

Section 413(e)(2)(B) provides that, if the pooled plan provider of a plan described in section 413(e)(1)(B) does not perform substantially all of the administrative duties required by section 413(e)(3)(A)(i) for any plan year, the Secretary may provide that the determination as to whether the plan meets the applicable Code requirements for a plan described in section 401(a) or a plan that consists of individual retirement accounts described in section 408 (including by reason of section 408(c)), whichever is applicable, will be made in the same manner as would be made without regard to section 413(e)(1).

Section 413(e)(3)(A) provides that, for purposes of section 413(e), the term pooled plan provider means, with respect to any plan, a person who:

- is designated by the terms of the plan as a named fiduciary (within the meaning of section 402(a)(2) of ERISA), as the plan administrator, and as the person responsible to perform specified administrative duties;
- registers as a pooled plan provider with the Secretary, and provides such other information to the Secretary as the Secretary may require, before beginning operations as a pooled plan provider;
- acknowledges in writing that such person is a named fiduciary (within the meaning of section 402(a)(2) of ERISA), and the plan administrator, with respect to the plan; and
- is responsible for ensuring that all persons who handle assets of, or who are fiduciaries of, the plan are bonded in accordance with section 412 of ERISA.⁵

The administrative duties for which the pooled plan provider is responsible are the duties (including conducting proper testing with respect to the plan and the employees of each employer in the plan) that are reasonably necessary to ensure that (1) the plan meets any requirements under ERISA or the Code applicable to a plan described in section 401(a) or to a plan that consists of individual retirement accounts described in section 408, whichever is applicable, and (2) each employer in the plan takes actions that the Secretary or the pooled plan provider determines are necessary for the plan to meet those requirements, including providing to the pooled plan provider any disclosures or other information that the Secretary may require or that the pooled plan provider otherwise determines are necessary to administer the plan or to allow the plan to meet the requirements of section 401(a) or 408. In determining whether a

⁵ The Department of Labor has issued guidance on the application of the bonding provision in its final rule on registration requirements for pooled plan providers. See 85 FR 72934, 72936 n.5 (November 16, 2020).

person meets the requirements to be a pooled plan provider with respect to any plan, all persons who perform services for the plan and who are treated as a single employer under section 414 (b), (c), (m), or (o) are treated as one person.

Section 413(e)(3)(B) provides that the Secretary may perform audits, examinations, and investigations of pooled plan providers as may be necessary to enforce and carry out the purposes of section 413(e). Section 413(e)(3)(D) provides that each employer in a plan with a pooled plan provider is treated as the plan sponsor with respect to the portion of the plan attributable to employees of the employer (or their beneficiaries), except with respect to the administrative duties of the pooled plan provider described in section 413(e)(3)(A)(i).

Section 413(e)(4)(A) directs the Secretary to issue guidance that the Secretary determines appropriate to carry out section 413(e), including guidance: (i) identifying the administrative duties and other actions required to be performed by a pooled plan provider under section 413(e); (ii) describing the procedures to be taken to terminate a plan which fails to meet the requirements to be a plan described in section 413(e)(1), including the proper treatment of, and actions needed to be taken by, any employer in the plan and the assets and liabilities of the plan attributable to employees of the employer (or their beneficiaries); and (iii) identifying appropriate cases to which the rules of section 413(e)(2)(A) will apply to employers in the plan failing to take the actions described in section 413(e)(1), taking into account whether the failure of an employer or pooled plan provider to provide any disclosures or other information, or to take any other action, necessary to administer a plan or to allow a plan to meet requirements applicable to the plan under section 401(a) or 408, whichever is applicable, has continued over a period of time that demonstrates a lack of commitment to compliance.

Section 413(e)(4)(B) states that an employer or pooled plan provider will not be treated as failing to meet a requirement of guidance issued pursuant to section 413(e)(4) if, before the guidance is issued, the employer or pooled plan provider complies in good faith with a reasonable interpretation of the provisions of section 413(e) to which the guidance relates.

Section 413(e)(5) requires the Secretary to publish model plan language which meets the requirements of section 413(e) and section 3(43) and (44) of ERISA and which may be adopted in order for a plan to be treated as a plan that has a pooled plan provider.

Section 101(e)(2) of the SECURE Act states that nothing in the amendments made by section 101(a) of the SECURE Act shall be construed as limiting the authority of the Secretary of the Treasury or the Secretary's delegate (determined without regard to such amendments) to provide for the proper treatment of a failure to meet any requirement applicable under the Code with respect to one employer (and its employees) in a multiple employer plan

Explanation of Provisions

I. Overview

The proposed regulations provide guidance to implement the exception to the unified plan rule for section 413(e) plans (unified plan exception). The proposed regulations define a section 413(e) plan as a defined contribution plan described in section 401(a), or a plan that consists of individual retirement accounts described in section 408 (including accounts described in sections 408(c), 408(k), or 408(p)), that is a section 413(c) plan (as defined in §1.413-2(a)(2)) and that (1) is maintained by employers that have a common interest other than having adopted the plan or (2) has a pooled plan provider. Because a section 413(e) plan is a type of section 413(c) plan, a section 413(e) plan is

subject to all of the rules of section 413(c), including the rules for participation in section 413(c)(1) and the rules for vesting in section 413(c)(3).⁶

These proposed regulations do not provide guidance on whether a section 413(e) plan is maintained by employers that have a common interest other than having adopted the plan. The Treasury Department and the IRS request comments on what (if any) guidance would be helpful regarding whether employers have such a common interest, including how any guidance should be coordinated with guidance issued by the Department of Labor. An employer that desires to participate in a section 413(e) plan may choose to participate in a defined contribution plan described in section 401(a) or 408 with a pooled plan provider in order to ensure that the plan is a plan described in section 413(e).⁷

Under the unified plan exception, a section 413(e) plan is not treated as failing to meet the requirements under the Code applicable to a plan described in section 401(a) or to a plan that consists of individual retirement accounts described in section 408 (including accounts described in section 408(c), 408(k), or 408(p)), whichever is applicable, merely because of a participating employer failure.⁸ For the unified plan exception to apply, the proposed regulations provide that certain conditions must be satisfied, including that the section 413(e) plan administrator must notify the participating employer of the participating employer

⁶ For rules relating to section 413(c) plans, see §1.413-2.

⁷ The Department of Labor has advised the Treasury Department and the IRS that an arrangement with a pooled plan provider can qualify as a pooled employer plan under section 3(43)(A) of ERISA without regard to whether the arrangement could be structured as a plan maintained by employers that have a common interest other than having adopted the plan. See also 86 FR 51488, 51490, n.12.

⁸ Section 1.416-1, Q&A G-2, includes a rule similar to the unified plan rule, providing that a failure by a MEP to satisfy section 416 with respect to employees of one participating employer means that all participating employers in the MEP are maintaining a plan that is not a qualified plan. This rule is based on the unified plan rule in §1.413-2(a)(3)(iv). Therefore, if a section 413(e) plan has an unresponsive employer that fails to satisfy section 416 and the section 413(e) plan meets the conditions for the exception to the unified plan rule, the section 413(e) plan will not be disqualified for the section 416 failure. The rules in §1.416-1 are outside the scope of these proposed regulations, but the Treasury Department and the IRS intend to address the topic in a broader guidance project updating the regulations under section 416.

failure and, in certain circumstances, transfer amounts attributable to the employees of the unresponsive participating employer to a separate plan maintained by the employer or provide an election to certain participants to remain in the plan or to have their accounts transferred to another eligible retirement plan.

In addition to defining a section 413(e) plan, the proposed regulations provide a number of other definitions, including the following: (1) a section 413(e) plan administrator is the plan administrator, within the meaning of section 414(g), of a section 413(e) plan; (2) a participating employer is one of the employers maintaining a section 413(e) plan; (3) an unresponsive participating employer is a participating employer that has a participating employer failure; (4) an employee is a current or former employee of a participating employer; (5) a beneficiary is a beneficiary of a deceased employee or an alternate payee (as defined in section 414(p)) with respect to an employee; and (6) a participating employer is one of the employers maintaining a section 413(e) plan. As discussed in the following paragraphs, the proposed regulations also include definitions for the following terms: (1) participating employer failure, (2) amounts attributable to the employees of the unresponsive participating employer, and (3) pooled plan provider.

The proposed regulations define a participating employer failure in a section 413(e) plan as a failure to provide information or a failure to take action. A failure to provide information is defined as a failure of a participating employer (or any person that is treated as a single employer with that employer under section 414(b), (c), (m), or (o)) to respond in a timely manner to a reasonable request by the section 413(e) plan administrator for data, documents, or any other information that the plan administrator reasonably believes is necessary to

determine whether a section 413(e) plan is in compliance with a requirement of section 401(a) or 408 as it relates to the participating employer. A failure to take action is defined as a failure of a participating employer (or any person that is treated as a single employer with that employer under section 414(b), (c), (m), or (o)) to comply in a timely manner with a reasonable request by a section 413(e) plan administrator to take action needed for the section 413(e) plan to satisfy a requirement of section 401(a) or 408 as it relates to the participating employer. For purposes of these definitions, a section 413(e) plan administrator's request would not be considered reasonable if it fails to give the employer sufficient time to provide information or take action (and, consequently, a participating employer's failure to respond to an unreasonable request would not be considered a participating employer failure).

The proposed regulations define amounts attributable to the employees of the unresponsive participating employer as plan assets and account balances held by a section 413(e) plan on behalf of employees of an unresponsive participating employer that are attributable to their employment with the unresponsive participating employer. The proposed regulations provide rules that apply if there is no separate accounting for amounts that are attributable to employment with the unresponsive participating employer and with other participating employers.⁹ If a participant's account balance includes amounts that are attributable to current employment with the unresponsive participating employer and to previous employment with one or more other participating employers, the entire account balance is treated as attributable to employment

⁹ In defining the amounts attributable to the employees of the unresponsive participating employer, the references in these proposed regulations to circumstances in which there is no "separate accounting" are not intended to address the recordkeeping obligations under Title I of ERISA, including sections 107 and 209 of ERISA, of an employer, plan administrator, or other plan fiduciary.

with the unresponsive participating employer. On the other hand, if a participant's account balance includes amounts that are attributable to current employment with a participating employer that is not the unresponsive participating employer and to previous employment with the unresponsive participating employer, none of the account balance is treated as attributable to employment with the unresponsive participating employer. For purposes of this definition, a participant's most recent employment with a participating employer in the MEP will be treated as the participant's current employment.

Under the proposed regulations, the term pooled plan provider means, with respect to any plan, a person who: (1) registers as a pooled plan provider with the Commissioner; (2) is designated by the terms of the plan as a named fiduciary (within the meaning of section 402(a)(2) of ERISA), as the plan administrator, and as the person required to perform certain administrative duties; (3) acknowledges in writing that, with respect to the plan, it is a named fiduciary and the plan administrator; and (4) is responsible for ensuring that all persons who handle assets of, or who are fiduciaries of, the plan are bonded in accordance with section 412 of ERISA.

The requirement to register as a pooled plan provider with the Commissioner is fulfilled by satisfying the parallel requirement under ERISA to register as a pooled plan provider with the Department of Labor. On November 16, 2020, the Department of Labor issued final regulations under section 3(44) of ERISA (29 CFR 2510.3–44) with respect to the registration requirement. See 85 FR 72934.

Consistent with section 413(e)(3)(A)(i), the proposed regulations require a pooled plan provider to perform all administrative duties that are reasonably necessary to ensure that: (1) the plan meets any applicable requirement under

ERISA or the Code for a plan described in section 401(a) or for a plan that consists of individual retirement accounts described in section 408 (including accounts described in section 408(c), 408(k), or 408(p)), whichever is applicable, and (2) each participating employer takes actions, including providing any disclosures or other information, that are necessary for the plan to meet those requirements.¹⁰

The administrative duties of a pooled plan provider include, but are not limited to, the following:

(1) Monitoring compliance with the terms of the plan, and Code and ERISA requirements;

(2) Maintaining accurate plan data, including providing up-to-date participant and beneficiary information;

(3) Performing and conducting coverage, top-heavy, and discrimination testing under sections 401(a)(4), (k), and (m), 408(k), 410, and 416, if applicable;

(4) Processing all employee transactions (such as investment changes, loans, and distributions);

(5) Satisfying Code and ERISA reporting and notice requirements (such as reporting requirements under sections 6047 (Form 1099-R, "Distributions From Pensions, Annuities, Retirement or Profit-Sharing Plans, IRAs, Insurance Contracts, etc.") and 6058 (Form 5500, "Annual Return/Report of Employee Benefit Plan"), and notice requirements under sections 401(k)(12)(D) and (13)(E) and 402(f)); and

¹⁰ In determining whether a person meets the requirements to be a pooled plan provider with respect to any section 413(e) plan, all persons who perform services for the plan and who are treated as a single employer under section 414(b), (c), (m), or (o) are treated as one person.

(6) Updating the plan to reflect statutory changes to the Code and ERISA, to the extent the responsibility for updating the plan document has been delegated to the section 413(e) plan administrator.

II. Conditions for Application of Exception to Unified Plan Rule

A. In General

The proposed regulations provide that, under the unified plan exception, a section 413(e) plan is not disqualified on account of a participating employer failure, provided that the plan satisfies certain conditions, which are described in Parts II.B through II.G of this Explanation of Provisions.

B. Plan Language

The proposed regulations provide that the terms of the section 413(e) plan document must include language describing the procedures that will be followed to address a participating employer failure, including a description of the notices that the section 413(e) plan administrator will send in the case of a participating employer failure (described in Part II.C of this Explanation of Provisions, titled “Notice Requirements”). The plan must also state that the section 413(e) plan administrator will send the first notice (or, if applicable, the combined first and second notice) by specified deadlines that depend on the type of failure. With respect to a failure to provide information, the specified deadline for sending the first notice is 12 months following the end of the plan year for which the information is necessary to determine whether the section 413(e) plan is in compliance with a requirement of section 401(a) or 408. With respect to a failure to take action, the specified deadline is 24 months following the end of the plan year in which the failure to satisfy a requirement of section 401(a) or 408 occurs.

In addition, the plan terms must describe the actions that the section 413(e) plan administrator will take if, by the end of the 60-day period following the

date the final notice is provided, the unresponsive participating employer does not take appropriate remedial action with respect to the failure or initiate a spinoff of amounts attributable to the employees of the unresponsive participating employer to a separate single-employer plan that is maintained by the employer. The terms of the section 413(e) plan must also provide that if an unresponsive participating employer does not either take appropriate remedial action or initiate a spinoff by that deadline, participants who are employees of the unresponsive participating employer have a nonforfeitable right to the amounts credited to their accounts that are attributable to employment with the unresponsive participating employer, determined in the same manner as if the plan had terminated pursuant to section 411(d)(3). In connection with the finalization of these proposed regulations, the Treasury Department and the IRS intend to publish guidance in the Internal Revenue Bulletin setting forth model language that may be used for this purpose.

The section 413(c) proposed regulations provided that a plan was ineligible for the unified plan exception if the plan was under examination before the first notice with respect to a participating employer failure was provided to an unresponsive participating employer. These proposed regulations do not include that condition. However, see the discussion in Part VI of this Explanation of Provisions, titled “Coordination with EPCRS,” on correcting a failure to send the first notice by the specified deadline, including when a plan is under examination.

C. Notice Requirements

The proposed regulations require the section 413(e) plan administrator to provide up to three notices regarding a participating employer failure to the unresponsive participating employer; with the final notice, if applicable, also

being provided to participants who are employees of the employer (and their beneficiaries) and the Department of Labor.¹¹

The first notice must describe the participating employer failure (or failures), as well as the actions the unresponsive participating employer must take to remedy the failure, and the employer's option to initiate a spinoff of amounts attributable to the employees of the unresponsive participating employer to a separate single-employer plan that is maintained by the employer. The first notice must also explain the consequences under the terms of the plan if the unresponsive participating employer neither takes appropriate remedial action with respect to the participating employer failure nor initiates a spinoff, including that participants who are employees of the employer will not have any further contributions made to the plan on their behalf and that individuals who are responsible for the failure may have adverse tax consequences.

If, by the end of the 60-day period following the date the first notice is provided, the unresponsive participating employer neither takes appropriate remedial action with respect to the participating employer failure nor initiates a spinoff (as described in Part II.D of this Explanation of Provisions, titled "Actions by Unresponsive Participating Employer"), then the section 413(e) plan administrator must provide a second notice to the employer. The second notice must be provided no later than 30 days after the expiration of the 60-day period following the date the first notice is provided. The second notice must include the information required to be included in the first notice. The second notice must also state that, if, within 60 days following the date the second notice is provided, the unresponsive participating employer neither takes appropriate remedial

¹¹ As described in Part II.E.2 of this Explanation of Provisions, titled "Failure to Provide Information that Becomes a Failure to Take Action," if the notices relate to a failure to provide information that becomes a failure to take action, then a new series of notices may be required.

action with respect to the participating employer failure nor initiates a spinoff, then a final notice describing the participating employer failure and the consequences of not correcting the failure will be provided to participants who are employees of the employer (and their beneficiaries) and to the Department of Labor.

The proposed regulations provide that if, by the end of the 60-day period following the date the second notice is provided, the unresponsive participating employer neither takes appropriate remedial action with respect to the participating employer failure nor initiates a spinoff, then the section 413(e) plan administrator must provide a final notice to the employer. The final notice must be provided no later than 30 days after the expiration of the 60-day period following the date the second notice is provided. Within this time period, the final notice must also be provided to participants who are employees of the unresponsive participating employer (and their beneficiaries) and to the Office of Enforcement of the Employee Benefits Security Administration in the Department of Labor (or its successor office).¹² The final notice must include the information required to be included in the first notice and specify the final deadline for an unresponsive participating employer to take action (which is 60 days after the final notice is provided). The final notice must also state that the notice is being provided to participants who are employees of the unresponsive participating employer (and their beneficiaries) and to the Department of Labor.

The section 413(c) proposed regulations also required plan administrators to send up to three notices with respect to a participating employer failure, but provided a 90-day period between notices. The shorter 60-day period between

¹² The notice to the Department of Labor should be mailed to the Employee Benefits Security Administration's Office of Enforcement (or its successor office). The Office of Enforcement is currently located at 200 Constitution Ave. NW, Suite 600, Washington, DC 20210.

notices in these proposed regulations is provided in response to comments recommending that the overall notice period be shortened.

D. Actions by Unresponsive Participating Employer

The proposed regulations provide that after the unresponsive participating employer has received notice of the participating employer failure, the employer has the opportunity to either take appropriate remedial action or initiate a spinoff. The final deadline for the unresponsive participating employer to take one of these actions is 60 days after the final notice is provided. The consequences of the employer's failure to meet this deadline are described in Part II.F of this Explanation of Provisions, titled "Required Actions Following Employer's Failure to Meet Deadline."

The proposed regulations provide that if a participating employer failure is a failure to provide information, the unresponsive participating employer takes appropriate remedial action with respect to that failure if the employer (or any person that is treated as a single employer with the employer under section 414(b), (c), (m), or (o)) provides the data, documents, or other information requested by a section 413(e) plan administrator (or arranges for that information to be provided to the section 413(e) plan administrator). If a participating employer failure is a failure to take action, the unresponsive participating employer takes appropriate remedial action with respect to the failure if the employer (or any person that is treated as a single employer with the employer under section 414(b), (c), (m), or (o)) takes all actions requested by the section 413(e) plan administrator, such as making corrective contributions, needed for the section 413(e) plan to satisfy the applicable requirements of section 401(a) or 408.

As an alternative to taking appropriate remedial action with respect to a failure to provide information or a failure to take action, the proposed regulations provide that an unresponsive participating employer may, after receiving notice of the participating employer failure, initiate a spinoff. An unresponsive participating employer initiates a spinoff by directing the section 413(e) plan administrator to spin off amounts attributable to the employees of the unresponsive participating employer to a separate single-employer plan that is maintained by the employer in a manner consistent with the terms of the section 413(e) plan. If the section 413(e) plan is described in section 401(a), then the spun-off plan must also be a section 401(a) plan. If the section 413(e) plan consists of individual retirement accounts described in section 408 (including accounts described in section 408(c), (k), or (p)), then the spun-off plan must also consist of individual retirement accounts described in section 408. The section 413(e) plan administrator must implement the spinoff, as described in Part II.E.2 of this Explanation of Provisions, titled “Implementing a Spinoff.”

E. Actions by Section 413(e) Plan Administrator Relating to Remedial Action or Employer-Initiated Spinoff

1. Failure to Provide Information that Becomes a Failure to Take Action

The proposed regulations describe when a failure to provide information becomes a failure to take action. This situation could occur if an unresponsive participating employer takes appropriate remedial action with respect to a failure to provide information, and the section 413(e) plan administrator determines that, based on the information provided by the employer, there is a failure to satisfy a requirement of section 401(a) or 408 as it relates to that employer’s participation in the section 413(e) plan. If the section 413(e) plan administrator makes a reasonable request for the employer to take the actions needed to satisfy the

requirement, and the employer does not comply in a timely manner with that request, then the failure to provide information becomes a failure to take action.

If a failure to provide information becomes a failure to take action, a section 413(e) plan will be eligible for the unified plan exception with respect to the failure to take action by satisfying the conditions set forth in the proposed regulations with respect to that failure. In satisfying those conditions, notices provided during the period that the failure was a failure to provide information are not taken into account. For example, a final notice that the section 413(e) plan administrator provided in connection with the failure to provide information would not satisfy the final notice requirement with respect to the failure to take action.

However, in response to comments on the section 413(c) proposed regulations that there were too many notices required in cases in which the failure to provide information became a failure to take action, the proposed regulations permit the section 413(e) plan administrator to reduce the number of notices that it sends to the employer in this situation. Specifically, if the section 413(e) plan administrator had provided the second notice with respect to a failure to provide information before it became a failure to take action, then the section 413(e) plan administrator may satisfy the requirement to send a first and second notice with respect to the failure to take action by sending a combined first and second notice to the unresponsive participating employer, provided that (1) the section 413(e) plan administrator's request to take action (described in the first paragraph under this Part II.E of this Explanation of Provisions) is made as soon as reasonably practicable after the determination of the failure to satisfy a requirement of section 401(a) or 408 as it relates to that employer's participation in the section 413(e) plan, and (2) the section 413(e) plan administrator provides the combined first and second notice with respect to the failure to take action not

later than 24 months following the end of the plan year in which the failure to satisfy a requirement of section 401(a) or 408 occurs. The combined first and second notice must include information similar to the information required for the first and second notices described in Part II.C of this Explanation of Provisions, titled “Notice Requirements.” For example, the combined first and second notice must describe the participating employer failure, the actions the unresponsive participating employer would need to take to remedy the failure, and the consequences under the terms of the plan if the employer neither takes appropriate remedial action with respect to the failure nor initiates a spinoff of amounts attributable to the employees of the unresponsive participating employer. In addition, the combined first and second notice must specify that, if, within 60 days following the date the combined first and second notice is provided, the unresponsive participating employer neither takes appropriate remedial action with respect to the participating employer failure nor initiates a spinoff, then the final notice described in Part II.C of this Explanation of Provisions, titled “Notice Requirements,” will be provided to participants who are employees of the employer (and their beneficiaries) and to the Department of Labor.

2. Implementing a Spinoff

The proposed regulations provide that if, instead of taking appropriate remedial action (as described in Part II.D of this Explanation of Provisions, titled “Actions by Unresponsive Participating Employer”), an unresponsive participating employer initiates a spinoff of amounts attributable to the employees of the unresponsive participating employer to a separate single-employer plan established and maintained by the employer, or to a separate plan sponsored by the employer that consists of individual retirement accounts, then the section

413(e) plan administrator must implement and complete the spinoff as soon as reasonably practicable after the employer initiates the spinoff. Under a safe harbor in the proposed regulations in §1.413-3(d)(2), the section 413(e) plan administrator is treated as satisfying this requirement if the spinoff is completed within 180 days of the date on which the unresponsive participating employer initiates the spinoff. Comments are requested on whether there are any circumstances in which it would be appropriate for any of the amounts attributable to the employees of the unresponsive participating employer to remain in the MEP after the employer has specifically directed that there be a spinoff, and, if so, what those circumstances are, and for which employees this treatment may be appropriate.

F. Required Actions Following Employer's Failure to Meet Deadline

The proposed regulations provide that if, by the final deadline (60 days after the final notice is provided), an unresponsive participating employer neither takes appropriate remedial action nor initiates a spinoff, then as soon as reasonably practicable after that deadline, the section 413(e) plan administrator must: (1) stop accepting contributions from the unresponsive participating employer and its employees; (2) provide notice to participants who are employees of the unresponsive participating employer (and their beneficiaries); and (3) to the extent provided in the proposed regulations, provide participants who are employees of the unresponsive participating employer (and their beneficiaries) with an election regarding treatment of their plan accounts. In addition, the section 413(e) plan administrator must distribute benefits as soon as administratively feasible following an individual's election or following the section

413(e) plan administrator's determination that it is not required to provide an individual with an election.¹³

The notice to participants required by §1.413-3(e)(1)(ii)(B) and (e)(2) of the proposed regulations must state that: (1) no further contributions will be made to the section 413(e) plan on behalf of participants who are employees of the unresponsive participating employer; (2) participants who are employees of the unresponsive participating employer have a nonforfeitable right to amounts credited to their accounts that are attributable to employment with the unresponsive participating employer; and (3) a participant who is an employee of the unresponsive participating employer (or, if applicable, any beneficiary of the participant) will receive additional information regarding the disposition of the participant's or beneficiary's account.

To satisfy the election requirement in §1.413-3(e)(1)(ii)(C) of the proposed regulations, except as otherwise provided by the proposed regulations, a section 413(e) plan administrator must provide participants who are employees of the unresponsive participating employer (and their beneficiaries) with an election to have amounts attributable to the employees of the unresponsive participating employer (1) directly rolled over to an eligible retirement plan within the meaning of section 402(c)(8), or (2) remain in the section 413(e) plan. With respect to this election, under a default rule in §1.413-3(e)(3)(ii) of the proposed regulations, an individual who fails to make an affirmative election is treated as having elected to have those amounts remain in the section 413(e) plan.

¹³ Whether an action is taken as soon as administratively feasible is determined under all the facts and circumstances. See Rev. Rul. 89-87, 1989-2 CB 81 (Whether a distribution is made as soon as administratively feasible after the date of plan termination specified by an employer is to be determined under all the facts and circumstances of a given case but, generally, a distribution that is not completed within one year following the date of termination will be presumed not to have been made as soon as administratively feasible.)

The option to remain in the plan is consistent with section 413(e)(2)(A), which requires the terms of the plan to provide, in part, that the plan assets attributable to the employees of the unresponsive participating employer will be transferred to an eligible retirement plan or to another arrangement that the Secretary determines is appropriate, unless the Secretary determines that it is in their best interests to retain the assets in the plan. The Treasury Department and the IRS have determined that it is in the best interest of an individual who elects to remain in the section 413(e) plan to have that election followed. In addition, the default rule with respect to that election, under which the account of an individual who does not make an affirmative election will remain in the section 413(e) plan, is consistent with the consent requirements of section 411(a)(11).

The proposed regulations provide that if an individual elects to have amounts attributable to the employees of the unresponsive participating employer remain in the section 413(e) plan, those amounts must remain in the section 413(e) plan until a distribution is made under the terms of the plan without regard to section 413(e). Although the terms of the section 413(e) plan continue to apply to a participant remaining in the plan, the section 413(e) plan administrator may not have contact with the participating employer after contributions have ceased (and, therefore, may not be notified about the individual's severance from employment with the employer). Accordingly, the proposed regulations provide that, in determining whether a participant is entitled to a distribution upon severance from employment, a section 413(e) plan administrator may rely on the participant's representation that the participant has experienced a severance from employment, unless the section 413(e) plan administrator has actual knowledge to the contrary.

The option to remain in the plan is not available to an individual if plan terms would have provided for a mandatory distribution of those amounts had the participant experienced a severance from employment. Instead, those amounts must be distributed from the section 413(e) plan. In this situation, the proposed regulations provide rules for the disposition of the mandatory distribution, based on the applicability of section 401(a)(31) under the terms of the plan that would apply in the case of a severance from employment. Comments are requested on whether there should be special rules for mandatory distributions that apply in this situation, including in cases involving missing participants.

The proposed regulations provide that the portion of the mandatory distribution that is an eligible rollover distribution subject to section 401(a)(31)(B) must be directly rolled over to an eligible retirement plan. In accordance with section 401(a)(31)(B), the section 413(e) plan administrator must provide the individual with an election for the rollover to be made either to an eligible retirement plan chosen by the individual or to an individual retirement plan of a designated trustee or issuer. For example, a section 413(e) plan administrator is not required to provide the option to remain in the plan to an individual with an account balance of \$3,000 if, consistent with sections 401(a)(31)(B) and 411(a)(11), plan terms require mandatory distributions with respect to a participant who experiences a severance from employment with an account balance of up to \$5,000 and automatic rollover of distributions with respect to a participant who experiences a severance from employment with an account balance that exceeds \$1,000.

For any portion of the mandatory distribution that is an eligible rollover distribution subject to section 401(a)(31)(A) (but not section 401(a)(31)(B)), the section 413(e) plan administrator must provide the individual with an election in

accordance with section 401(a)(31)(A) for that portion to be rolled over directly to an eligible retirement plan chosen by the individual or, if no eligible retirement plan is chosen, paid directly to the individual.

For the portion of a mandatory distribution that is not subject to the requirement to offer a direct rollover option under section 401(a)(31), the section 413(e) plan administrator must pay the individual. For example, a section 413(e) plan administrator is not required to provide an election to an individual with an account balance of less than \$200 if, consistent with section 411(a)(11) and §1.401(a)(31), Q&A-11, plan terms require that mandatory distributions of less than \$200 be paid directly to distributees.

Giving an individual an election to have amounts transferred to an individual retirement plan generally does not mean that a distribution may be paid directly to the individual. However, if, pursuant to the proposed regulations, an individual makes an election to have an amount directly rolled over to an eligible retirement plan, and a portion of the amount is not an eligible rollover distribution described in section 402(c)(4), then that portion must be paid directly to the individual. For example, the portion of a distribution that would be a required minimum distribution under section 401(a)(9) must be paid directly to the individual rather than directly rolled over. In addition, if an individual is otherwise entitled to a distribution from the section 413(e) plan without regard to section 413(e), the individual may elect to have amounts paid directly to the individual.

Any election that is provided to an individual pursuant to the proposed regulations must include an effective opportunity for the individual to make the election. Whether an individual has an effective opportunity is determined based on all the relevant facts and circumstances, including the adequacy of notice of

the availability of the election, the period of time during which the election may be made, and any other conditions on the election.

G. Duties of a Pooled Plan Provider

The proposed regulations provide that, if a section 413(e) plan has a pooled plan provider during the plan year of a participating employer failure, the unified plan exception will not apply unless the pooled plan provider performs substantially all of the administrative duties that are required of the pooled plan provider for that year.

III. Other Rules

A. Form of Notices and Elections

Any notice required to be provided or election required to be made under the proposed regulations must be in written or electronic form. For notices and elections provided to or made by participants and beneficiaries, see generally §1.401(a)-21 for rules permitting the use of electronic media to provide applicable notices and make participant elections with respect to retirement plans.

B. Status of Spun-off Plan

In the case of any plan that is spun off in accordance with the proposed regulations, any participating employer failure that would have caused the section 413(e) plan to fail to meet the requirements of section 401(a) or 408, as applicable, but for the application of the unified plan exception, will result in the spun-off plan failing to meet those requirements.

C. Responsible Parties

The proposed regulations provide that a participating employer demonstrates a lack of commitment to compliance if the participating employer fails to take appropriate remedial action or initiate a spinoff by the final deadline (60 days after the final notice). The IRS reserves the right to pursue appropriate

remedies under the Code against any party (such as the owner of the participating employer) who is responsible for the failure to satisfy the requirements of section 401(a) or 408, as applicable, even in the party's capacity as a participant or beneficiary (such as by not treating a section 413(e) plan distribution made with respect to the owner of a participating employer as an eligible rollover distribution).

IV. Updates to Section 413(c) Regulations

The proposed regulations update existing §1.413-2 to reflect legislation enacted after the regulations were issued. The proposed regulations update the rules for determining the number of employers maintaining a plan for purposes of the requirement in §1.413-2(a)(2)(i)(B) of the proposed regulations that a section 413(c) plan must be maintained by more than one employer. For purposes of that requirement, the proposed regulations include a rule that the number of employers maintaining a plan is determined by treating any employers described in section 414(m) (relating to affiliated service groups) as if such employers are a single employer. The existing regulations in §1.413-2(a)(2) were issued in 1979 and, therefore, did not address section 414(m), which was added by section 201(a) of the Miscellaneous Revenue Act of 1980, Pub. L. 96-605 (94 Stat. 3521). Section 414(m) provides that all employers in an affiliated service group shall be treated as a single employer for certain purposes.

The proposed regulations also modify the definition of a section 413(c) plan and the unified plan rule in the final section 413(c) regulations to apply to a plan that consists of individual retirement accounts under section 408, remove a reference to section 405(a) from the final section 413(c) regulations (because that section was repealed), and modify the final section 413(c) regulations to add

that the exclusive benefit provision in section 413(c)(2) applies for purposes of section 408(c).¹⁴

V. Withdrawal of Section 413(c) Proposed Regulations

Because section 101 of the SECURE Act amended the Code with respect to the unified plan rule after the issuance of the section 413(c) proposed regulations, the Treasury Department and the IRS withdraw the section 413(c) proposed regulations.

VI. Coordination with EPCRS

A. In General

Under EPCRS,¹⁵ a failure to follow plan terms is an operational failure that adversely affects plan qualification. An operational failure would include, for example, a section 413(e) plan administrator's failure to provide the first notice by the applicable deadline included in plan terms, discussed in Part II.B of this Explanation of Provisions, titled "Plan Language." EPCRS sets forth three programs for correcting operational failures.

Under the Self-Correction Program (SCP), a plan sponsor that follows established compliance practices and procedures may correct operational failures without paying a fee or sanction. A plan sponsor of a qualified plan (for example, a plan that is intended to satisfy section 401(a)) may correct significant operational failures under SCP if the plan has a favorable determination letter or

¹⁴ Section 414(l) does not apply to a plan that consists of individual retirement accounts described in section 408. Therefore, in §1.413-2(a)(2)(i)(A), the proposed regulations limit the cross references to section 413(a) and §1.413-1(a)(2) to apply only to qualified plans.

¹⁵ The Employee Plans Compliance Resolution System (EPCRS) is a comprehensive system of correction programs for sponsors of certain retirement plans, including plans that are intended to satisfy the requirements of sections 401(a), 408(k), and 408(p). EPCRS provides procedures for an employer to correct a plan's failure to satisfy an applicable qualification requirement so that the failure does not result in disqualification of the plan. EPCRS has been updated and expanded several times, most recently in Rev. Proc. 2021-30, 2021-1 I.R.B. 324. The discussion in this Part VI of this Explanation of Provisions is limited to the application of EPCRS to qualified plans under section 401(a). See Rev. Proc. 2021-30 for rules under sections 408(k) and 408(p).

a favorable opinion or advisory letter.¹⁶ In general, correction of a significant operational failure through SCP must be completed by the last day of the correction period, which generally ends on the last day of the third plan year following the plan year for which the failure occurred.¹⁷ However, the correction period for a significant operational failure that occurs for any plan year ends on the first date the plan or plan sponsor is under examination¹⁸ for that plan year.¹⁹

Under the Voluntary Correction Program (VCP), a plan sponsor, at any time before audit, may file a VCP submission, pay an applicable user fee, implement corrective actions, and satisfy any other conditions in an IRS compliance statement for correction of an operational failure in a qualified plan, SEP, or SIMPLE IRA Plan. In general, if the plan or plan sponsor is under examination, VCP is not available.

Under the Audit Closing Agreement Program (Audit CAP), if an operational failure (other than a failure corrected through SCP or VCP) is identified on audit, the plan sponsor may correct the failure and pay a sanction. The sanction imposed will bear a reasonable relationship to the nature, extent, and severity of the failure, and will be based on a number of factors,²⁰ including the maximum payment amount (which is approximately equal to the tax the IRS could collect upon plan disqualification).

B. Using EPCRS to Correct an Operational Failure to Timely Provide the First Notice

¹⁶ See section 4.03 of Rev. Proc. 2021-30.

¹⁷ Section 9 of Rev. Proc. 2021-30 addresses the period for correcting significant operational failures under SCP, including some exceptions to this general rule.

¹⁸ Under examination is defined in section 5.08 of Rev. Proc. 2021-30.

¹⁹ If correction has been substantially completed (as described in section 9.03 of Rev. Proc. 2021-30) before the end of the correction period, correction is permitted to be completed after the end of the correction period.

²⁰ See section 14 of Rev. Proc. 2021-30.

A section 413(e) plan administrator's failure to provide the first notice with respect to a participating employer failure by the applicable deadline included in plan terms would not affect the section 413(e) plan's eligibility for the unified plan exception. However, the failure to follow plan terms would result in an operational failure treated as a significant operational failure under EPCRS that is independent of any underlying participating employer failure.

Whether SCP, VCP, or Audit CAP is available to correct an operational failure to provide the first notice by the applicable deadline will be determined under the rules of EPCRS. Because the failure is a significant operational failure, the failure may be corrected under SCP only if correction is completed (or substantially completed) by the end of the correction period, and the correction period generally ends on the last day of the third plan year following the plan year containing the deadline for sending the first notice. For example, if the deadline for sending the first notice is December 31, 2024, a failure to provide notice by that deadline generally may be corrected through SCP until December 31, 2027 (assuming the plan year is the calendar year). If, however, the plan or plan sponsor comes under examination for 2024 beginning on July 1, 2026, the correction period for SCP ends on July 1, 2026, and SCP is no longer available (unless the correction had been substantially completed by that date).

A failure to provide the first notice by the deadline included in the terms of the plan may also be corrected under VCP. If, for example, the deadline for sending the first notice is December 31, 2024, and the correction period under SCP ends on December 31, 2027, then a VCP application may be submitted with respect to the failure in 2028 or in a later year, provided that neither the plan nor the plan sponsor is under examination for the plan year ending December 31,

2024. If SCP and VCP are not available with respect to a failure, the failure may be corrected under Audit CAP.

C. Resolution of Participating Employer Failure

If the unresponsive participating employer provides the information requested by the section 413(e) plan administrator in connection with a failure to provide information, there is no longer a failure to provide information. If the unresponsive participating employer takes the action requested by the plan administrator in connection with a failure to take action (and the plan satisfies the requirements of SCP, VCP, or Audit CAP, as applicable, with respect to the underlying failure), there is no longer a failure to take action. In either case, if a participating employer failure no longer exists, an operational failure to provide the first notice by the deadline included in plan terms with respect to that participating employer failure is treated as corrected.

Proposed Applicability Date

These regulations are proposed to apply beginning on the date of publication of the Treasury decision adopting these rules as final regulations in the **Federal Register**. Pursuant to section 413(e)(4)(B), until the final regulations are published, an employer or pooled plan provider may rely on a good faith, reasonable interpretation of the provisions of section 413(e) to which the final regulations relate. Compliance with these proposed regulations is considered reliance on a good faith, reasonable interpretation of the provisions of section 413(e) to which the final regulations relate.

Availability of IRS Documents

For copies of recently issued revenue procedures, revenue rulings, notices and other guidance published in the Internal Revenue Bulletin, please

visit the IRS Web site at www.irs.gov or contact the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402.

Special Analyses

I. Regulatory Impact Analysis

These regulations are not subject to review under section 6(b) of Executive Order 12866 pursuant to the Memorandum of Agreement (April 11, 2018) between the Treasury Department and the Office of Management and Budget regarding review of tax regulations.

II. Paperwork Reduction Act

The following provisions of the proposed regulations contain a collection of information: (1) §1.413-3(a)(2)(i) (requirement to adopt plan language); (2) §1.413-3(a)(2)(ii)(A), (b), and (d)(1)(ii) (requirement to provide notice with respect to a participating employer failure); (3) §1.413-3(a)(3) (requirements to be a pooled plan provider); (4) §1.413-3(e)(1)(ii)(B) and (e)(2) (requirement to provide notice to certain participants and beneficiaries; and (5) §1.413-3(e)(1)(ii)(C), (e)(3), and (e)(4) (requirement to provide an election to certain participants and beneficiaries). The collection of information contained in proposed §1.413-3 will generally be carried out by section 413(e) plan administrators seeking to satisfy the conditions for the exception to the unified plan rule. The collection of information in this notice of proposed rulemaking has been submitted to the Office of Management and Budget for review in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)).

1. Plan Language Requirement, §1.413-3(a)(2)(i)

Section 1.413-3(a)(2)(i) states that, as one of the conditions of the exception to the unified plan rule, a section 413(e) plan must include plan language that sets forth the procedures that will be followed to address

participating employer failures. Thus, a section 413(e) plan will not be eligible for the exception to the unified plan rule if it does not satisfy this plan-language requirement. In general, the plan language requirement is a one-time paperwork burden for each section 413(e) plan. In addition, after final regulations are issued, the IRS intends to publish model plan language, which will help to minimize the burden.

We estimate that the burden for this requirement under the Paperwork Reduction Act of 1995 will be 3 hours per section 413(e) plan. Given the potential benefits of satisfying the conditions for the unified plan exception, we assume that approximately 95 percent of section 413(e) plans (4,275 section 413(e) plans²¹) will be amended to satisfy this condition. Therefore, the total burden of this requirement is estimated to be 12,825 hours (4,275 section 413(e) plans times 3 hours). However, because a section 413(e) plan that adopts an amendment will generally do so on a one-time basis, to determine an annual estimate, the total time is divided by three, or 4,275 hours annually (section 413(e) plans times 1 hour).

2. Notice Requirements, §1.413-3(a)(2)(ii)(A), (b), and (d)(1)(ii)

Section 1.413-3(a)(ii)(A) of the proposed regulations provide that notice is another condition of the exception to the unified plan rule. In most cases, §1.413-3(b) of the proposed regulations would require a section 413(e) plan administrator to send up to three notices informing an unresponsive participating employer of a participating employer failure and the consequences if the employer fails to take remedial action or initiate a spinoff from the section 413(e)

²¹ This calculation uses data from the 2018 Form 5500, "Annual Return/Report of Employee Benefit Plan." These filings indicate that there are approximately 4,523 defined contribution MEPs. See 2018 Form 5500 Annual Reports Abstract (dol.gov). We estimate that 4,500 defined contribution MEPs will satisfy the requirements to be a section 413(e) plan.

plan. After each notice is provided, the employer has 60 days to take appropriate remedial action or initiate a spinoff from the section 413(e) plan. If the employer takes those actions after the first or second notice is provided, subsequent notices are not required. Thus, it is possible that a section 413(e) plan administrator will send fewer than three notices to an employer. However, because the notice requirements only apply if an employer has already been unresponsive to the section 413(e) plan administrator's requests, we assume that in most cases, all three notices will be provided.

Section 1.413-3(d)(1)(ii) of the proposed regulations provide that if a failure to provide information becomes a failure to take action, the section 413(e) plan administrator may be required to send up to two (rather than three) notices with respect to the failure to take action by combining the first and second notices. This rule applies if the section 413(e) plan administrator had provided the second notice with respect to the failure to provide information and certain other conditions are satisfied.

We estimate that the burden of preparing the notices will be an average of 3 hours per unresponsive participating employer. We estimate that approximately 450 section 413(e) plans (10 percent of the 4,500 total estimated section 413(e) plans described in footnote 20) will provide notice with respect to one unresponsive participating employer per year. We estimate that approximately 10 percent of section 413(e) plans (10 percent of 4,500 section 413(e) plans is 450 section 413(e) plans) will provide notice with respect to one unresponsive participating employer per year. Therefore, we estimate a burden of 1,350 hours (450 section 413(e) plans times 3 hours). As with all estimates in this collection of information, we expect to be able to adjust these estimates based on experience after the regulations are finalized.

The notices must be sent to the unresponsive participating employer and the final notice will also be sent to plan participants who are employees of the unresponsive participating employer (and their beneficiaries) and to the Department of Labor. We estimate that, on average, a section 413(e) plan administrator will send the final notice to approximately 50 plan participants who are employees of the unresponsive participating employer (and their beneficiaries). Based on the estimate in the previous paragraph that 450 section 413(e) plans will provide notice with respect to one unresponsive participating employer per year, we estimate the burden of distributing these notices to be an average of 2 hours per section 413(e) plan, for a total burden of 900 hours (450 section 413(e) plans times 2 hours).

3. Requirements for Pooled Plan Providers, §1.413-3(a)(3)

Under the proposed regulations, the term pooled plan provider means, with respect to any plan, a person who satisfies the following requirements:

(1) registers as a pooled plan provider with the Commissioner (§1.413-3(a)(3)(i)(A)); (2) is designated by the terms of the plan as a named fiduciary (within the meaning of section 402(a)(2) of ERISA), as the plan administrator, and as the person required to perform certain administrative duties (§1.413-3(a)(3)(i)(B)); (3) acknowledges in writing that, with respect to the plan, it is a named fiduciary and the plan administrator (§1.413-3(a)(3)(i)(C)); and (4) is responsible for ensuring that all persons who handle assets of, or who are fiduciaries of, the plan are bonded in accordance with section 412 of ERISA (§1.413-3(a)(3)(i)(D)).

Pursuant to proposed §1.413-3(a)(3)(i)(A), the requirement to register as a pooled plan provider under section 413(e) is fulfilled by satisfying the parallel requirement under ERISA to register as a pooled plan provider with the

Department of Labor. On November 16, 2020, the Department of Labor issued final regulations under section 3(44) of ERISA (29 CFR §2510.3–44) with respect to the registration requirement. See 85 FR 72934. The OMB Control Number associated with the requirement in those regulations is 1210–0164.

With respect to §1.413-3(a)(3)(i)(B) and (C), the Department of Labor estimates that roughly 3,200 pooled plan providers will file an original registration, and that there will be 3,460 supplemental filings in the first year. See 85 FR 72952. A supplemental filing may amend the original registration to include information for pooled employer plans that either begin or cease operations, or it can be used to make certain other changes to the initial filing. Based on this data, we estimate that in the first year a large number of the estimated supplemental filings, or 3,000, will be used to report the beginning of pooled employer plan operations. In subsequent years, we estimate that approximately 450 plans with pooled plan providers will commence operations.²² We estimate the combined burden of §1.413-3(a)(3)(i)(B) and (C) to be an average of 15 minutes per section 413(e) plan, for a total initial burden of 750 hours (3,000 section 413(e) plans times 15 minutes) and a total annual burden of 112.5 hours (450 section 413(e) plans times 15 minutes).

4. Notice to Participants, §1.413-3(e)(1)(ii)(B) and (e)(2)

If an unresponsive participating employer neither takes appropriate remedial action nor initiates a spinoff by the deadline in the proposed regulations, then the section 413(e) plan administrator must provide notice to participants who are employees of the unresponsive participating employer (and their beneficiaries) stating the following: (1) no further contributions will be made to the

²² This estimate was informed by the Department of Labor's estimate of the number of pooled employer plans expected to commence operations. See 85 FR 72952-3

section 413(e) plan on their behalf; (2) they have a nonforfeitable right to amounts credited to their accounts that are attributable to employment with the unresponsive participating employer; and (3) they will receive additional information regarding the disposition of their accounts. We estimate that in a given year, 5 percent of all section 413(e) plans (225 section 413(e) plans) will provide this notice, and that each notice will be sent to approximately 50 individuals. We also estimate that the burden for this requirement is 1 hour. Based on this number, we estimate that the burden of preparing and distributing the notices will be 225 hours (225 section 413(e) plans times 1 hour).

5. Election, §1.413-3(e)(1)(ii)(C), (e)(3) and (4)

If an unresponsive participating employer neither takes appropriate remedial action nor initiates a spinoff by the deadline in the proposed regulations, then the section 413(e) plan administrator generally must provide participants who are employees of the unresponsive participating employer (and their beneficiaries) with an election to have amounts attributable to the employees of the unresponsive participating employer directly rolled over to an eligible retirement plan within the meaning of section 402(c)(8) or remain in the section 413(e) plan. A participant whose account is subject to the mandatory distribution rules will have an alternative election. We estimate that in a given year, 5 percent of all section 413(e) plans (225 section 413(e) plans) will provide an election, and that each election will be sent to approximately 50 individuals. We also estimate that the burden for this requirement is 3 hours. Based on this number, we estimate that the burden for this requirement will be 675 hours (225 section 413(e) plans times 3 hours).

Comments on the collection of information should be sent to the **Office of Management and Budget**, Attn: Desk Officer for the Department of the

Treasury, Office of Information and Regulatory Affairs, Washington, DC 20503, with copies to the Internal Revenue Service, Attn: IRS Reports Clearance Officer, SE:W:CAR:MP:T:T:SP; Washington, DC 20224. Comments on the collection of information should be received by [INSERT DATE 60 DAYS AFTER PUBLICATION IN THE *FEDERAL REGISTER*]. Comments are specifically requested concerning:

Whether the proposed collection of information is necessary for the proper performance of the functions of the IRS, including whether the information will have practical utility;

The accuracy of the estimated burden associated with the proposed collection of information;

How the quality, utility, and clarity of the information to be collected may be enhanced;

How the burden of complying with the proposed collections of information may be minimized, including through the application of automated collection techniques or other forms of information technology; and

Estimates of capital or start-up costs and costs of operation, maintenance, and purchase of service to provide information.

Estimated total average annual recordkeeping burden: 7,750 hours

Estimated average annual burden per response: 1 hour, 43 minutes

Estimated number of recordkeepers: 4,500

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a valid control number assigned by the Office of Management and Budget.

Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal

revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

III. Regulatory Flexibility Act

It is hereby certified that these proposed regulations will not have a significant economic impact on a substantial number of small entities pursuant to the Regulatory Flexibility Act (5 U.S.C. chapter 6). This certification is based on the fact that the proposed regulations reflect the statutory changes to section 413 made by section 101 of the SECURE Act. More specifically, these regulations merely conform existing regulations under section 413(c) and implement new regulations under section 413(e) in a manner that is consistent with the new statutory language.

Although these proposed regulations might affect a substantial number of small entities, the economic impact of these proposed regulations is not expected to be significant. These regulations are not expected to result in economically meaningful changes in behavior for MEPs and participating employers. While MEPs may be an efficient way to reduce costs and complexity associated with establishing and maintaining defined contribution plans, some employers may be reluctant to join a MEP because of the potential adverse impact of the unified plan rule. These proposed regulations will implement a statutory exception to the unified plan rule, thus eliminating a potential barrier to an employer joining a MEP.

It is unlikely that the exception to the unified plan rule will be used often in a section 413(e) MEP. In general, it is expected that participating employers in defined contribution MEPs will comply with applicable requirements for a defined contribution plan. Accordingly, the use of the exception to the unified plan rule by a section 413(e) plan is expected to be rare.

For the reasons stated, a regulatory flexibility analysis under the Regulatory Flexibility Act is not required. The Treasury Department and the IRS invite comments on the impact of these regulations on small entities. Pursuant to section 7805(f) of the Code, this notice of proposed rulemaking has been submitted to the Chief Counsel of Advocacy of the Small Business Administration for comment on its impact on small business.

Comments and Public Hearing

Before these proposed amendments to the regulations are adopted as final regulations, consideration will be given to comments that are submitted timely to the IRS as prescribed in the preamble under the “**ADDRESSES**” section. The Treasury Department and the IRS request comments on all aspects of the proposed regulations. Comments are specifically requested on what (if any) guidance would be helpful regarding whether employers have a common interest other than having adopted a plan, as described in Part I.A of the Explanation of Provisions, titled “Overview.” Comments are also specifically requested on the rules for mandatory distributions for employees of an unresponsive participating employer, as described in Part II.F of the Explanation of Provisions, titled “Required Actions Following Employer’s Failure to Meet Deadline.”

Any electronic comments submitted, and to the extent practicable any paper comments submitted, will be made available at www.regulations.gov or upon request.

A telephonic public hearing has been scheduled for June 22, 2022, beginning at 10 a.m. EST. The rules of 26 CFR 601.601(a)(3) apply to the hearing. Persons who wish to present oral comments by telephone at the hearing must submit electronic or written comments and an outline of the topics

to be addressed and the time to be devoted to each topic by **[INSERT DATE 60 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER]** as prescribed in the preamble under the **ADDRESSES** section.

A period of 10 minutes will be allocated to each person for making comments. After the deadline for receiving outlines has passed, the IRS will prepare an agenda containing the schedule of speakers. Copies of the agenda will be made available at www.regulations.gov, search IRS and REG-121508-18. Copies of the agenda will also be available by emailing a request to publichearings@irs.gov. Please put “REG-121508-18 Agenda Request” in the subject line of the email.

Drafting Information

The principal authors of these regulations are Jamie Dvoretzky and Pamela Kinard, Office of Associate Chief Counsel (Employee Benefits, Exempt Organizations, and Employment Taxes (EEE)). However, other personnel from the IRS and the Treasury Department participated in the development of these regulations.

Withdrawal of Proposed Amendments to the Regulations

Under the authority of 26 U.S.C. 7805, the notice of proposed rulemaking that was published in the **Federal Register** on Wednesday, July 3, 2019 (84 FR 31777) is withdrawn.

List of Subjects in 26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

Proposed Amendments to the Regulations

Accordingly, 26 CFR part 1 is proposed to be amended as follows:

PART 1--INCOME TAXES

Paragraph 1. The authority citation for part 1 continues to read in part as follows:

Authority: 26 U.S.C. 7805 * * *

Par. 2. Amend § 1.413-2 by revising paragraph (a)(2), (a)(3)(iv), (a)(4), and (c) to read as follows:

§1.413-2 Special rules for plans maintained by more than one employer.

(a) * * *

(2) *Section 413(c) plan--(i) Definition of section 413(c) plan.* A plan (and each trust which is part of such plan) is a section 413(c) plan if--

(A) The plan is a single plan (which for a qualified plan is a single plan within the meaning of section 413(a) and §1.413-1(a)(2)); and

(B) The plan is maintained by more than one employer.

(ii) *Determining the number of employers maintaining the plan.* For purposes of paragraph (a)(2)(i)(B) of this section, the number of employers maintaining a plan is determined by treating any employers described in section 414(b) (relating to a controlled group of corporations), any employers described in section 414(c) (relating to trades or businesses under common control), or any employers described in section 414(m) (relating to affiliated service groups), whichever is applicable, as if such employers are a single employer.

(iii) *Master or prototype plans and common trust funds.* A master or prototype plan is not a section 413(c) plan unless such a plan is described in this paragraph (a)(2). Similarly, the mere fact that a plan, or plans, utilize a common trust fund or otherwise pool plan assets for investment purposes does not, by itself, result in a particular plan being treated as a section 413(c) plan.

(3) * * *

(iv) Whether a section 413(c) plan complies with the requirements of section 401(a), 403(a), or 408 is determined with respect to all participating employers. Consequently, the failure by one participating employer (or by the plan itself) to satisfy an applicable requirement of those sections will result in the section 413(c) plan failing to satisfy that requirement with respect to all employers maintaining the section 413(c) plan. However, the rules in this paragraph (a)(3)(iv) do not apply to the extent provided in section 413(e) and §1.413-3.

(4) *Applicability dates*--(i) *General applicability date*. Except as otherwise provided in paragraph (a)(4)(ii) of this section, section 413(c) and this section apply to a plan for plan years beginning after December 31, 1953.

(ii) *Special applicability date*. Paragraphs (a)(2), (a)(3)(iv), and (c) of this section apply beginning on the date of publication of the Treasury decision adopting these rules as final regulations in the **Federal Register**. For earlier periods, the rules of paragraphs (a)(2), (a)(3)(iv), and (c) of 26 CFR 1.413-2 (revised as of April 1, 2021) apply.

* * * * *

(c) *Exclusive benefit*. In the case of a plan subject to this section, in determining whether the plan of an employer is for the exclusive benefit of its employees (and their beneficiaries) for purposes of sections 401(a) and 408(c), all of the employees participating in the plan shall be treated as employees of the employer.

* * * * *

Par. 3. Section 1.413-3 is added to read as follows:

§1.413-3 Special Rules for Section 413(e) Plans

(a) *Exception to unified plan rule for section 413(e) plans--(1) In general.*

Notwithstanding §1.413-2(a)(3)(iv), a section 413(e) plan will not be treated as failing to meet the requirements under the Code applicable to a plan described in section 401(a) or to a plan that consists of individual retirement accounts described in section 408 (including accounts described in section 408(c), 408(k), or 408(p)), whichever is applicable, merely because of a participating employer failure, provided that the conditions in paragraph (a)(2) of this section are satisfied.

(2) *Conditions for exception to general rule.* The conditions for the exception to the unified plan rule in paragraph (a)(1) of this section are set forth in paragraphs (a)(2)(i) through (iii) of this section.

(i) *Plan language.* The terms of the section 413(e) plan must set forth the procedures that will be followed to address a participating employer failure, including:

(A) A description of the notices that the section 413(e) plan administrator will send in the case of a participating employer failure, pursuant to paragraph (b) of this section;

(B) A statement that the section 413(e) plan administrator will send the first notice described in paragraph (b)(1) of this section (or, if applicable, the combined first and second notice described in paragraph (d)(1)(ii) of this section) by a specified deadline (which, for a failure to provide information, is 12 months following the end of the plan year for which the information is necessary to determine whether the section 413(e) plan is in compliance with a requirement of section 401(a) or 408 and which, for a failure to take action, is 24 months following the end of the plan year in which the failure to satisfy a requirement of section 401(a) or 408) occurs;

(C) A description of the actions that the section 413(e) plan administrator will take if, by the final deadline described in paragraph (c)(1) of this section, an unresponsive participating employer does not either take appropriate remedial action pursuant to paragraph (c)(2) of this section or initiate a spinoff pursuant to paragraph (c)(3) of this section; and

(D) A statement that if an unresponsive participating employer does not either take appropriate remedial action or initiate a spinoff by the final deadline described in paragraph (c)(1) of this section, participants who are employees of the unresponsive participating employer have a nonforfeitable right to the amounts credited to their accounts that are attributable to employment with the unresponsive participating employer, determined in the same manner as if the plan had terminated pursuant to section 411(d)(3).

(ii) *Section 413(e) plan administrator obligations.* A section 413(e) plan administrator must--

(A) Satisfy the notice requirements described in paragraph (b) of this section with respect to the participating employer failure (taking into account the rules for a combined first and second notice described in paragraph (d)(1)(ii) of this section);

(B) Implement a spinoff in accordance with paragraph (d)(2) of this section if an unresponsive participating employer initiates a spinoff pursuant to paragraph (c)(3) of this section; and

(C) Take the actions required in paragraph (e) of this section if an unresponsive participating employer fails either to take appropriate remedial action with respect to the participating employer failure (as described in paragraph (c)(2) of this section) or initiate a spinoff (as described in paragraph

(c)(3) of this section) by the final deadline described in paragraph (c)(1) of this section.

(iii) *Pooled plan providers.* If the section 413(e) plan has a pooled plan provider during the plan year of the participating employer failure, the pooled plan provider must perform substantially all of the administrative duties that are required of the pooled plan provider pursuant to paragraph (a)(3)(ii) of this section for the plan year.

(3) *Section 413(e) plans administered by pooled plan providers--(i) Requirements to be a pooled plan provider.* With respect to a section 413(e) plan, for purposes of this section, a pooled plan provider is a person who--

(A) Registers as a pooled plan provider with the Commissioner by satisfying the registration requirements in section 3(44)(A)(ii) of the Employee Retirement Income Security Act of 1974, Public Law 93-406 (88 Stat. 829), as amended (ERISA), in accordance with guidance issued by the Department of Labor,

(B) Is designated by the terms of the plan as a named fiduciary (within the meaning of section 402(a)(2) of ERISA), as the plan administrator, and as the person required to perform the administrative duties described in paragraph (a)(3)(ii) of this section,

(C) Acknowledges in writing that, with respect to the plan, it is a named fiduciary and the plan administrator, and

(D) Is responsible for ensuring that all persons who handle assets of, or who are fiduciaries of, the plan are bonded in accordance with section 412 of ERISA.

(ii) *Administrative duties required of pooled plan provider--(A) In general.* A pooled plan provider is required to perform all administrative duties that are

reasonably necessary to ensure that the plan meets any applicable requirement under ERISA or the Code for a plan described in section 401(a) or for a plan that consists of individual retirement accounts described in section 408 (including accounts described in section 408(c), 408(k), or 408(p)), whichever is applicable, and each participating employer takes actions, including providing any disclosures or other information, that are necessary for the plan to meet the requirements described in this paragraph (a)(3)(ii)(A).

(B) *Administrative duties.* The administrative duties of a pooled plan provider include, but are not limited to, the following:

(1) Monitoring compliance with the terms of the plan, and Code and ERISA requirements;

(2) Maintaining accurate plan data, including up-to-date participant and beneficiary information;

(3) Performing and conducting coverage, top-heavy, and discrimination testing under sections 401(a)(4), (k), and (m), 408(k), 410, and 416, if applicable;

(4) Processing all employee transactions (such as investment changes, loans, and distributions);

(5) Satisfying Code and ERISA reporting and notice requirements (such as reporting requirements under sections 6047 and 6058 and notice requirements under sections 401(k)(12)(D) and (13)(E) and 402(f)); and

(6) Updating the plan to reflect statutory changes to the Code and ERISA, to the extent the responsibility for updating the plan document has been delegated to the section 413(e) plan administrator.

(iii) *Aggregation rules.* In determining whether a person meets the requirements to be a pooled plan provider with respect to any section 413(e)

plan, all persons who perform services for the plan and who are treated as a single employer under section 414(b), (c), (m), or (o) are treated as one person.

(4) *Definitions.* The following definitions apply for purposes of this section:

(i) *Amounts attributable to the employees of the unresponsive participating employer.* Amounts attributable to the employees of the unresponsive participating employer are plan assets and account balances held by a section 413(e) plan on behalf of employees of an unresponsive participating employer that are attributable to their employment with the unresponsive participating employer. If there is no separate accounting for amounts that are attributable to employment with the unresponsive participating employer and with other participating employers, and a participant's account balance includes amounts that are attributable to current employment with the unresponsive participating employer and to previous employment with one or more other participating employers, the entire account balance is treated as attributable to employment with the unresponsive participating employer. On the other hand, if a participant's account balance includes amounts that are attributable to current employment with a participating employer that is not the unresponsive participating employer and to previous employment with the unresponsive participating employer, none of the account balance is treated as attributable to employment with the unresponsive participating employer. For purposes of this paragraph (a)(4)(i), a participant's most recent employment with a participating employer in the section 413(e) plan will be treated as the participant's current employment.

(ii) *Beneficiary.* A beneficiary is a beneficiary of a deceased employee or an alternate payee (as defined in section 414(p)) with respect to an employee.

(iii) *Employee*. An employee is a current or former employee of a participating employer.

(iv) *Failure to provide information*. A failure to provide information is a failure of a participating employer (or any person that is treated as a single employer with that employer under section 414(b), (c), (m), or (o)) to respond in a timely manner to a reasonable request by the section 413(e) plan administrator for data, documents, or any other information that the plan administrator reasonably believes is necessary to determine whether a section 413(e) plan is in compliance with a requirement of section 401(a) or 408 as it relates to the participating employer.

(v) *Failure to take action*. A failure to take action is a failure of a participating employer (or any person that is treated as a single employer with that employer under section 414(b), (c), (m), or (o)) to comply in a timely manner with a reasonable request by a section 413(e) plan administrator to take action needed for the section 413(e) plan to satisfy a requirement of section 401(a) or 408 as it relates to the participating employer.

(vi) *Participating employer*. A participating employer is one of the employers maintaining a section 413(e) plan.

(vii) *Participating employer failure*. A participating employer failure in a section 413(e) plan is a failure to provide information (as defined in paragraph (a)(4)(iv) of this section) or a failure to take action (as defined in paragraph (a)(4)(v) of this section).

(viii) *Section 413(e) plan*. A section 413(e) plan is a defined contribution plan described in section 401(a) or a plan that consists of individual retirement accounts described in section 408 (including accounts described in section 408(c), (k), or (p)) that--

(A) Is a section 413(c) plan (as defined in § 1.413-2(a)(2)), and

(B) Is maintained by employers that all have a common interest other than having adopted the plan or has a pooled plan provider as described in paragraph (a)(3) of this section.

(ix) *Section 413(e) plan administrator.* A section 413(e) plan administrator is the plan administrator, within the meaning of section 414(g), of a section 413(e) plan.

(x) *Unresponsive participating employer.* An unresponsive participating employer is a participating employer that has a participating employer failure.

(b) *Notice.* The section 413(e) plan administrator satisfies the notice requirements with respect to a participating employer failure if it satisfies the requirements of this paragraph (b).

(1) *First notice.* The section 413(e) plan administrator must provide notice to the unresponsive participating employer describing the participating employer failure, the actions the employer must take to remedy the failure, and the employer's option to initiate a spinoff of amounts attributable to the employees of the unresponsive participating employer to a separate single-employer plan that is maintained by the employer. In addition, the notice must explain the consequences under the terms of the plan if the unresponsive participating employer neither takes appropriate remedial action with respect to the participating employer failure nor initiates a spinoff, including that participants who are employees of the employer will not have any further contributions made to the plan on their behalf and that individuals who are responsible for the failure may have adverse tax consequences.

(2) *Second notice.* If, by the end of the 60-day period following the date the first notice described in paragraph (b)(1) of this section is provided, the

unresponsive participating employer neither takes appropriate remedial action with respect to the participating employer failure nor initiates a spinoff, then the section 413(e) plan administrator must provide a second notice to the employer. The second notice must be provided no later than 30 days after the expiration of the 60-day period described in the preceding sentence. The second notice must include the information required to be included in the first notice. The second notice must also state that if, within 60 days following the date the second notice is provided, the unresponsive participating employer neither takes appropriate remedial action with respect to the participating employer failure nor initiates a spinoff, then a final notice describing the participating employer failure and the consequences of not correcting the failure will be provided to participants who are employees of the employer (and their beneficiaries) and to the Department of Labor.

(3) *Final notice.* If, by the end of the 60-day period following the date the second notice described in paragraph (b)(2) of this section is provided, the unresponsive participating employer neither takes appropriate remedial action with respect to the participating employer failure nor initiates a spinoff, then the section 413(e) plan administrator must provide a final notice to the employer. The final notice must be provided no later than 30 days after the expiration of the 60-day period described in the preceding sentence. Within this time period, the final notice must also be provided to participants who are employees of the unresponsive participating employer (and their beneficiaries) and to the Office of Enforcement of the Employee Benefits Security Administration in the Department of Labor (or its successor office). The final notice must include the information required to be included in the first notice and specify the final deadline for an unresponsive participating employer to take action set forth in paragraph (c)(1) of

this section. The final notice must also state that the notice is being provided to participants who are employees of the unresponsive participating employer (and their beneficiaries) and to the Department of Labor.

(c) Actions by unresponsive participating employer--(1) In general. An unresponsive participating employer takes appropriate remedial action with respect to a participating employer failure if it satisfies the requirements of paragraph (c)(2) of this section. Alternatively, an unresponsive participating employer initiates a spinoff for purposes of paragraph (a)(2) of this section if the employer satisfies the requirements of paragraph (c)(3) of this section. The final deadline for an unresponsive participating employer to take one of these actions is 60 days after the final notice described in paragraph (b)(3) of this section is provided to the employer.

(2) Appropriate remedial action--(i) Appropriate remedial action with respect to a failure to provide information. If a participating employer failure is a failure to provide information, the unresponsive participating employer takes appropriate remedial action with respect to that failure if the employer provides the data, documents, or other information requested by a section 413(e) plan administrator (or arranges for that information to be provided to the section 413(e) plan administrator).

(ii) Appropriate remedial action with respect to a failure to take action. If a participating employer failure is a failure to take action, the unresponsive participating employer takes appropriate remedial action with respect to the failure if the employer (or any person that is treated as a single employer with the employer under section 414(b), (c), (m), or (o)), takes all actions requested by the section 413(e) plan administrator, such as making corrective contributions,

needed for the section 413(e) plan to satisfy the applicable requirements of section 401(a) or 408.

(3) *Employer-initiated spinoff.* After receiving a notice described in paragraph (b) of this section, an unresponsive participating employer initiates a spinoff pursuant to this paragraph (c)(3) by directing the section 413(e) plan administrator to spin off amounts attributable to the employees of the unresponsive participating employer to a separate single-employer plan that is maintained by the employer in a manner consistent with the terms of the section 413(e) plan. If the section 413(e) plan is described in section 401(a), then the spun-off plan must also be a section 401(a) plan. If the section 413(e) plan consists of individual retirement accounts described in section 408 (including accounts described in section 408(c), 408(k), or 408(p)), then the spun-off plan must also consist of individual retirement accounts described in section 408.

(d) *Section 413(e) plan administrator's response to employer's remedial action--(1) Rules for a failure to provide information that becomes a failure to take action--(i) In general.* This paragraph (d)(1) provides rules that apply if a failure to provide information becomes a failure to take action. This situation could occur if the unresponsive participating employer takes appropriate remedial action by providing the information described in paragraph (c)(2)(i) of this section and, based on this information, the section 413(e) plan administrator determines that there is a failure to satisfy a requirement of section 401(a) or 408 as it relates to that employer's participation in the section 413(e) plan. If the section 413(e) plan administrator makes a reasonable request for the employer to take the actions needed to satisfy the requirement, and the employer does not comply in a timely manner with that request, then, in accordance with paragraph (a)(4)(v) of this section, the failure to provide information becomes a failure to take action. In

that case, the section 413(e) plan will be eligible for the exception in paragraph (a)(1) of this section with respect to the failure to take action by satisfying the conditions set forth in paragraph (a)(2) of this section with respect to that failure, taking into account the rules of this paragraph (d)(1).

(ii) *Ability to combine first and second notices in certain circumstances.* For purposes of applying paragraph (a)(2)(ii)(A) of this section in the case of a failure to provide information that becomes a failure to take action, notices provided during the period that the failure was a failure to provide information are not taken into account. For example, a final notice that the section 413(e) plan administrator provided in connection with the failure to provide information would not satisfy the final notice requirement with respect to the failure to take action. However, if the section 413(e) plan administrator had provided the second notice described in paragraph (b)(2) of this section with respect to a failure to provide information before it became a failure to take action, then the section 413(e) plan administrator may satisfy the requirement to send a first and second notice with respect to the failure to take action by sending a combined first and second notice that includes the information described in paragraph (d)(1)(iii) of this section to the unresponsive participating employer, provided that--

(A) The section 413(e) plan administrator's request to take action described in paragraph (d)(1)(i) of this section is made as soon as reasonably practicable after the determination of the failure to satisfy a requirement of section 401(a) or 408 as it relates to that employer's participation in the section 413(e) plan; and

(B) The section 413(e) plan administrator provides the combined first and second notice with respect to the failure to take action not later than 24 months

following the end of the plan year in which the failure to satisfy a requirement of section 401(a) or 408 occurs.

(iii) *Contents of combined first and second notice.* To satisfy the requirements of a combined first and second notice described in paragraph (d)(1)(ii) of this section, the notice must--

(A) Describe the participating employer failure, the actions the unresponsive participating employer would need to take to remedy the failure, and the employer's option to initiate a spinoff of amounts attributable to the employees of the unresponsive participating employer to a separate single-employer plan that is maintained by the employer,

(B) Explain the consequences under the terms of the plan if the unresponsive participating employer neither takes appropriate remedial action with respect to the participating employer failure nor initiates a spinoff, including that participants who are employees of the employer will not have any further contributions made to the plan on their behalf and that individuals who are responsible for the failure may have adverse tax consequences, and

(C) Specify that if, within 60 days following the date the combined first and second notice is provided, the unresponsive participating employer neither takes appropriate remedial action with respect to the participating employer failure nor initiates a spinoff, then a notice describing the participating employer failure and the consequences of not correcting the failure will be provided to participants who are employees of the employer (and their beneficiaries) and to the Department of Labor.

(2) *Implementing employer-initiated spinoff.* If an unresponsive participating employer initiates a spinoff pursuant to paragraph (c)(3) of this section by directing the section 413(e) plan administrator to spin off amounts

attributable to the employees of the unresponsive participating employer to a separate single-employer plan established and maintained by the employer, or to a separate plan sponsored by the employer that consists of individual retirement accounts, then the section 413(e) plan administrator must implement and complete the spinoff as soon as reasonably practicable after the employer initiates the spinoff. The section 413(e) plan administrator is treated as satisfying the requirement of the prior sentence if the spinoff is completed within 180 days of the date on which the unresponsive participating employer initiates the spinoff.

(e) Required actions following employer's failure to meet deadline--(1) In general--(i) Deadline for action. If, by the final deadline described in paragraph (c)(1) of this section, the unresponsive participating employer neither takes appropriate remedial action pursuant to paragraph (c)(2) of this section nor initiates a spinoff pursuant to paragraph (c)(3) of this section, then the requirements of paragraph (e)(1)(ii) and (iii) of this section must be satisfied.

(ii) Requirements for section 413(e) plan administrator. As soon as reasonably practicable after the final deadline described in paragraph (e)(1)(i) of this section, the section 413(e) plan administrator must--

(A) Stop accepting contributions from the unresponsive participating employer and its employees;

(B) Provide notice to participants who are employees of the unresponsive participating employer (and their beneficiaries) as described in paragraph (e)(2) of this section; and

(C) Provide participants who are employees of the unresponsive participating employer (and their beneficiaries) with an election regarding treatment of their plan accounts to the extent provided in paragraph (e)(3) or (4) of this section.

(iii) *Timing of distributions.* The section 413(e) plan administrator must distribute benefits as soon as administratively feasible following an individual's election that is made pursuant to paragraph (e)(3) or (4) of this section or following the section 413(e) plan administrator's determination that it is not required to provide an individual with an election pursuant to paragraph (e)(4)(iv) of this section.

(2) *Contents of notification.* The notice required under paragraph (e)(1)(ii)(B) of this section must include the information described in this paragraph (e)(2).

(i) *No contributions.* The notice must state that no further contributions will be made to the section 413(e) plan on behalf of participants who are employees of the unresponsive participating employer.

(ii) *Full vesting.* The notice must state that participants who are employees of the unresponsive participating employer have a nonforfeitable right to amounts credited to their accounts that are attributable to employment with the unresponsive participating employer.

(iii) *Information about disposition of accounts.* The notice must state that a participant who is an employee of the unresponsive participating employer (or, if applicable, any beneficiary of the participant) will receive additional information regarding the disposition of the participant's or beneficiary's account.

(3) *Election for direct rollover or to remain in section 413(e) plan--(i) General rule.* Except as provided in paragraph (e)(4) of this section, a section 413(e) plan administrator must provide participants who are employees of the unresponsive participating employer (and their beneficiaries) with an election to have amounts attributable to the employees of the unresponsive participating employer--

(A) Subject to the rules of paragraph (e)(5) of this section, directly rolled over to an eligible retirement plan within the meaning of section 402(c)(8); or

(B) Remain in the section 413(e) plan.

(ii) *Default.* An individual who fails to make an affirmative election described in paragraph (e)(3)(i)(A) of this section is treated as having elected to have the amounts described in paragraph (e)(3)(i) of this section remain in the section 413(e) plan.

(iii) *Individuals remaining in section 413(e) plan.* If, pursuant to paragraph (e)(3)(i)(B) of this section, an individual elects to have the amounts described in paragraph (e)(3)(i) of this section remain in the section 413(e) plan, those amounts must remain in the section 413(e) plan until a distribution is made under the terms of the plan without regard to section 413(e). To determine whether a participant is entitled to a distribution upon severance from employment under the terms of the plan without regard to section 413(e), a section 413(e) plan administrator may rely on the participant's representation that the participant has experienced a severance from employment unless the plan administrator has actual knowledge to the contrary.

(4) *Rules for individuals subject to mandatory distributions--*(i) *No election to remain in plan.* The option to remain in the plan described in paragraph (e)(3)(i)(B) of this section with respect to amounts described in paragraph (e)(3)(i) of this section is not available to an individual if the terms of the plan would have provided for a mandatory distribution of those amounts had the participant experienced a severance from employment. Instead, those amounts must be distributed from the section 413(e) plan.

(ii) *Mandatory distributions subject to automatic rollover.* The portion of the mandatory distribution that is an eligible rollover distribution subject to section

401(a)(31)(B) must be directly rolled over to an eligible retirement plan. In accordance with section 401(a)(31)(B), the section 413(e) plan administrator must provide the individual with an election for the eligible retirement plan to be--

- (A) An eligible retirement plan chosen by the individual, or
- (B) An individual retirement plan of a designated trustee or issuer.

(iii) *Mandatory distributions not subject to automatic rollover.* For the portion of the mandatory distribution that is an eligible rollover distribution subject to section 401(a)(31)(A) (but not section 401(a)(31)(B)), the section 413(e) plan administrator must provide the individual with an election in accordance with section 401(a)(31)(A) for that portion to be--

(A) Rolled over directly to an eligible retirement plan chosen by the individual; or

(B) If no eligible retirement plan is chosen pursuant to paragraph (e)(4)(iii)(A) of this section, paid directly to the individual.

(iv) *Individuals who are ineligible for direct rollover.* For any portion of a mandatory distribution that is not subject to the requirement to offer a direct rollover option under section 401(a)(31), the section 413(e) plan administrator must pay the individual. For example, a section 413(e) plan administrator is not required to provide an election to an individual with an account balance of less than \$200 if, consistent with section 411(a)(11) and §1.401(a)(31)-1, Q&A-11, plan terms require that mandatory distributions of less than \$200 be paid directly to distributees.

(5) *Amounts not eligible for rollover.* If an individual makes an election to have an amount described in paragraph (e)(3)(i) of this section directly rolled over to an eligible retirement plan pursuant to paragraph (e)(3) or (4) of this section, and a portion of the amount is not an eligible rollover distribution

described in section 402(c)(4), then that portion must be paid directly to the individual. For example, the portion of a distribution that would be a required minimum distribution under section 401(a)(9) must be paid directly to the individual.

(6) *Effective opportunity to make election.* Any election that is provided to an individual pursuant to paragraph (e)(3) or (4) of this section must include an effective opportunity for the individual to make the election. Whether an individual has an effective opportunity to make an election is determined based on all the relevant facts and circumstances, including the adequacy of notice of the availability of the election, the period of time during which the election may be made, and any other conditions on the election.

(f) *Other rules--(1) Form of notices and elections.* Any notice provided or election made pursuant to paragraph (b) or (e) of this section must be in written or electronic form. For notices and elections provided to or made by participants and beneficiaries, see generally §1.401(a)-21 for rules permitting the use of electronic media to provide applicable notices and make participant elections with respect to retirement plans.

(2) *Status of spun-off plan.* In the case of any plan that is spun off in accordance with paragraph (d)(2) of this section, any participating employer failure that would have caused the section 413(e) plan to fail to meet the requirements of section 401(a) or 408, as applicable, but for the application of the exception set forth in paragraph (a)(1) of this section, will result in the spun-off plan failing to meet those requirements.

(3) *Responsible parties.* A participating employer demonstrates a lack of commitment to compliance if the participating employer fails to take appropriate remedial action pursuant to paragraph (c)(2) of this section or initiate a spinoff

pursuant to paragraph (c)(3) of this section by the final deadline described in paragraph (c)(1) of this section. The IRS reserves the right to pursue appropriate remedies under the Code against any party (such as the owner of the participating employer) who is responsible for the failure to satisfy the requirements of section 401(a) or 408, as applicable, even in the party's capacity as a participant or beneficiary (such as by not treating a section 413(e) plan distribution made with respect to the owner of a participating employer as an eligible rollover distribution).

(g) *Applicability date.* This section applies beginning on [PUBLICATION DATE OF FINAL RULE].

Douglas W. O'Donnell,

Deputy Commissioner for Services and Enforcement.

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